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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1287

ASHLAND COAL AND ICE COMPANY, ET AL.,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION.

SUPPLEMENTAL REPLY TO MOTION TO AFFIRM BY INTERVENING RAILROADS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PRELIMINARY STATEMENT.

On May 1, 1945, we filed a reply to a motion to affirm on behalf of the United States and the Interstate Commerce Commission.

On April 21, 1945, we were served with an additional motion on behalf of "appellee railroads." This latter motion covers only two points to which additional reply seems necessary. They are:

(a) Reference to the statements made by the Commission in its final decision to wit:

> Since then in more than a dozen decisions we have prescribed rates from one or more of these

origin groups to a number of destinations to the north, south, and west of the present $2.65 group, which, in general, compare favorably, differences in distance and transportation conditions considered, with this assailed rate to the destination group as it has existed throughout the entire reparation period, and

(b) Reference to the fact that the Commission, in its decision, found rates to the eastern portion of the so-called $2.65 rate group not unreasonable for the future, thereby having the effect of splitting up the former group as it had existed in the past.

ARGUMENT.

1. Reliance upon "compared" or "prescribed" rates to the "north, south, and west" of the contested area affords no justification for the diametrically opposed conclusions reached upon the same mass of evidence and upon a single statutory standard. In other words if such reliance constitutes a valid defense with respect to the assailed rate the defense would have the same force for the future as for the past.

Moreover, this case was not presented to the Commission on any undertaking to prove unreasonableness from the standpoint of rate comparisons. In our original Brief to the Commission we made this plain in our opening statement where we said:

> A statement at the outset of the hypothesis of our complaint will be helpful to an orderly presentation and consideration of the case.
>
> The case here made, in support of our contention that the assailed rates are and have been unreasonable *per se*, is novel in the sense that it does not follow the usual plan of relying *as a primary proposition*, upon the standard of "rate comparison." On the contrary, we here tender to the Commission for the exercise of its administrative discretion, a case built *primarily* upon the cost of service, plus, or including, a fair measure of profit to the carriers performing the service.

And this fact was clearly recognized by the Commission as will appear from the following statement at pp. 430, 431, of its report:

> Complainants' case is principally based upon the premise that the cost of performing the service should be largely determinative of the reasonableness of the assailed rates. The cost study presented by complainants in the first hearing was defective in certain respects as pointed out in the prior report. At the further hearing, complainants presented additional cost evidence with a view to overcoming those defects.

And from the following statements at p. 451 of its report:

> The assailed rate of $2.65 to the destination group as a whole *compares favorably* with rates from both the southern and northern fields to many destinations throughout the East and to the Carolinas. Confined to the less-distant points in the group, however, most of such comparisons indicate that the assailed rate is relatively high. *Moreover, measured by cost alone, this rate is much too high,* especially to the western portion of the group. While we are not warranted in fixing rates solely on the basis of cost, nevertheless that element, *when supported by a cost study such as the one here before us, is entitled to considerable weight.* (Emphasis ours)

In other words, the Commission albeit the assailed rate "compare(d) favorable" with other rates concluded that "measured by cost alone" it "was much too high." If such a conclusion is sound as speaking from 1944 on or in an atmosphere of ascending costs, it must have been doubly sound during the cost study period which closed in 1940.

2. It is true that the final decision of the Commission had the effect of splitting or dividing the old $2.65 rate group which formerly had extended from a north and south line drawn just east of Lynchburg, Va., to tidewater. But what the appellee railroads fail to point out is that such action points inevitably to the conclusion that "measured by cost alone" the rates to the western or nearermost portion of

the group must have been even more unreasonable than they were as applied to the group as a whole.

Furthermore, our cost studies and the studies and analyses made by the Commission's cost-finding experts contemplated the group as a whole. In this connection it is interesting to note that to the group *as a whole* the Commission's cost experts found that our study, as revised by them, would produce a weighted average cost of $2.09 per ton as compared with the assailed rate of $2.65 per ton (256 I. C. C. 445). Included in the above "costs" were (a) operating expenses, (b) taxes (excluding Federal income taxes), (c) rents, (d) return on total investment (freight and passenger service), and (e) deficits from passenger and less-than-carload freight service.

If our study subjected to the careful scrutiny of the Commission's own analysts showed that such an all-inclusive "cost" *to the group as a whole* amounted to only $2.09 per ton, it is utterly unrealistic to argue that a finding limited only to the western half of the group would offer any justification for a conclusion of the Commission purporting to imply a valid "change of conditions" as between the future and the past.

Wherefore, for the reasons stated herein, and for those equally apropos in our reply to a similar motion on behalf of the government, we pray that the motion to affirm be denied.

Respectfully submitted,

WALTER M. EVANS,
HARRY C. AMES,
Attorneys for Appellants.

May, 1945.